STATE OF MICHIGAN

COURT OF APPEALS

JAMES G. PATTY,

Plaintiff/Appellant-Cross-Appellee,

V

GRANGER CONSTRUCTION COMPANY,

Defendant/Third-Party
Plaintiff/Appellee-Cross-Appellant.

UNPUBLISHED
February 23, 2006

No. 263215
Isabella Circuit Court
LC No. 03-002686-NO

Before: Bandstra, P.J., and Fitzgerald and White, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's order granting defendant summary disposition pursuant to MCR 2.116(C)(10) under the open and obvious doctrine in this premises liability case. Defendant cross-appeals the circuit court's denial of summary disposition under the common work area doctrine. We reverse the circuit court's grant of summary disposition under the open and obvious doctrine. In the cross-appeal, we affirm the denial of summary disposition under the common work area doctrine.

This case stems from plaintiff's fall at a construction site where he was working as a carpenter for a subcontractor of defendant. Plaintiff was injured when he fell from a two-by-six inch board that was atop a landing and stairs that he was constructing for defendant. The landing where plaintiff was injured was located at the top of a flight of stairs and approximately six feet off the ground. The stairs and landing provided egress from the mechanical room through a window onto the roof.

At the time of the accident the construction work was not yet completed on either the steps or the landing. Only the framework, consisting of steel studs and metal floor joists, had been constructed. A metal grating, which was on backorder, still needed to be attached to the frame of the stair treads and the landing. Plaintiff testified that one or two days before the incident he or his coworker screwed plywood onto the steel studs on the stairs to temporarily allow safe traverse. Plaintiff testified that he did not attach plywood to the landing because he had used it all on the stairs. Three or four days before the incident plaintiff observed that a two-by-six inch board had been placed over the metal floor joists on the landing. During this time plaintiff traversed the two-by-six to exit through the window in order to take a coffee break on the roof and observed "other trades" using the partially constructed stairs to go in and out of the egress window.

Plaintiff and his coworker were instructed to finish building the handrails on the landing. Plaintiff testified that on the day of his accident, he stood on the two-by-six for about one hour performing this task before the board slipped and caused him to fall down between the floor joists and hook his arm on a joist sustaining serious injury.

Plaintiff filed a complaint alleging that defendant negligently failed to implement reasonable safety measures in common work areas. Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10) on two bases: that plaintiff's claim failed because the condition was open and obvious, and that plaintiff could not establish all the elements of the common work area doctrine. The circuit court denied defendant's motion for summary disposition on the basis of the common work area doctrine finding that "there is a conflict in testimony regarding the use of the . . . partially completed stairs by other subcontractors over the Plaintiff's employer." The circuit court granted defendant's motion for summary disposition on the basis of the open and obvious doctrine.

During the pendency of this appeal, the Supreme Court held that the "open and obvious doctrine has no applicability to a claim brought under the common work area doctrine." *Ghaffari v Turner Construction Co*, 473 Mich 16, 17; 699 NW2d 687 (2005). Thus, the circuit court's grant of summary disposition on this basis must be reversed.

On cross-appeal, defendant argues that the circuit court erred when it concluded that a genuine issue of fact existed whether plaintiff could recover from defendant under the common work area doctrine. We disagree.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The moving party must specifically identify the matters that have no disputed factual issues. MCR 2.116(G)(4); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The moving party must support its position with affidavits, depositions, admissions, or other documentary evidence. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). Once the moving party has met this burden, the burden shifts to the opposing party to show that a genuine issue of material fact exists. *Michigan Mut Ins Co v Dowell*, 204 Mich App 81, 85; 514 NW2d 185 (1994). When the burden of proof at trial would rest on the opposing party, the opposing party may not rest on mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts to show that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

The common work area doctrine is an exception to the common law rule that property owners and general contractors cannot be held liable for the negligence of independent subcontractors and their employees. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 53; 684 NW2d 320 (2004). For a general contractor to be held liable under the common work area doctrine, a plaintiff must show that (1) the general contractor failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workers (4) in a common work area. *Id.*, 54. A plaintiff's failure to satisfy any of the four elements of the

common work area doctrine is fatal. *Id*., 59.

Defendant asserted below that plaintiff could not establish elements three and four of the doctrine. In *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 8; 574 NW2d 691 (1997), this Court concluded that where only four men were exposed to the risk of a collapsing roof overhang located twenty feet off the ground the defendant had "not breached its duty to guard against a danger posing a 'high degree of risk to a significant number of workmen.'" *Hughes, supra,* quoting *Funk v Gen Motors Corp,* 392 Mich 91, 104; 220 NW2d 641 (1974).

Plaintiff submitted below defendant's work records for the date of his accident, as well as for dates surrounding his accident. Defendant's work records for the day of the accident state that there were thirty-nine employees of subcontractors on site, and ten foremen. Plaintiff testified that the area he was working on and injured on was used by electricians and masons, and others, and that he observed "other trades" using the stairway to gain access to the roof. Defendant's records indicate that on the date of the accident there were five electricians and sixteen masons at the job site. Defendant Granger's field superintendent, Mark Storey, testified on deposition that plaintiff's deposition testimony that trades other than carpenters (of which plaintiff and his co-worker were), including masons and roofers and possibly tin knockers, used the incompleted stairs on which plaintiff was injured to gain access to the roof area, was "probably a true statement." A project engineer of defendant's, who testified he was at the site approximately once a week, testified that to his knowledge, the area plaintiff was injured in was "an isolated area," and that there were masons and other workers present, but not in the specific area plaintiff was working in.

We agree with the circuit court that plaintiff established a question of fact as to whether the two-by-six created a high degree of risk to a significant number of workers in a common work area.[1] In the instant case, plaintiff presented evidence below from which a reasonable fact-finder could conclude that significantly more workers than present in *Hughes,* used the stairway plaintiff was injured on.

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[1] The circuit court stated on the record at the conclusion of the hearing on defendant's motion for summary disposition:

> In the depositions presented to the court, there is a conflict in testimony regarding the use of the part-, partially completed stairs by other subcontractors over the Plaintiff's employer. The Plaintiff testified that he saw a number of other subcontractors use the partially completed stairs as a means of access to the egress window for access to the roof. The Defendant has presented deposition testimony that provide that Plaintiff and his co-worker were the only ones in the area. This conflict in evidence is sufficient to create a material issue of fact that would have to be resolved by the trier of fact.

We affirm the circuit court's denial of summary disposition to defendant under the common work area doctrine. We reverse the circuit court's grant of summary disposition on the basis of the open and obvious doctrine.

/s/ E. Thomas Fitzgerald
/s/ Helene N. White